

IA No. GA 1 of 2021
APOT No. 159 of 2021
with
CS No. 576 of 1990
IN THE HIGH COURT AT CALCUTTA
In Appeal from its
ORDINARY ORIGINAL CIVIL JURISDICTION
CIVIL APPELLATE JURISDICTION

Dr. Narinder Kohli
Versus
Jagannath Marothia & Ors.

Before:
The Hon'ble Justice I. P. MUKERJI
And
The Hon'ble Justice ANIRUDDHA ROY
Date: 17th November 2021
(via Video Conference)

Appearance:
Mr. Shyamal Sarkar, Sr. Advocate
Mr. Sudip Deb, Advocate
Mr. Vivek Basu, Advocate
Mr. P. K. Bagaria, Advocate
for the appellant
Mr. K. R. Thaker, Advocate
Mr. Sanjib Dawn, Advocate
for the respondents

The Court: By consent of learned counsel for the parties the stay application (IA No. GA 1 of 2021) not appearing in the list is treated as on the day's list.

We formally admit the appeal.

As will appear from the discussion below, it is very much necessary to dispose of this appeal at this stage. We propose to do so today, dispensing with all formalities.

The suit is of 1990. It is a suit for specific performance of an agreement for sale of an immovable property. The appellant defendant no.3 in or about September, 2020 took out an application under Order VII Rule 11 of the Civil Procedure Code for dismissal of the suit.

The point taken was very short but most important. It was based on section 31 of the Foreign Exchange Regulation Act, 1973. The section is inserted below

“31. (1) *No person who is not a citizen of India and no company (other than a banking company) which is not incorporated under any law in force in India [***] shall, except with the previous general or special permission of the Reserve Bank acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India :*

Provided *that nothing in this sub-section shall apply to the acquisition or transfer of any such immovable property by way of lease for a period not exceeding five years.*

(2) *Any person or company referred to in sub-section (1) and requiring a special permission under that sub-section for acquiring, or holding, or transferring, or disposing of, by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India may make an application to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank.*

(3) *On receipt of an application under sub-section (2), the Reserve Bank may, after making such inquiry as it deems fit, either grant or refuse to grant the permission applied for:*

Provided *that no permission shall be refused unless the applicant has been given a reasonable opportunity for making a representation in the matter :*

Provided further *that if before the expiry of a period of ninety days from the date on which the application was received by the Reserve Bank, the Reserve Bank does not communicate to the applicant that the permission applied for has been refused, it shall be presumed that the Reserve Bank has granted such permission.*

Explanation : In computing the period of ninety days for the purposes of the second proviso, the period, if

any, taken by the Reserve Bank for giving an opportunity to the applicant for making a representation under the first proviso shall be excluded.

(4) Every person and company referred to in subsection (1) holding at the commencement of this Act any immovable property situate in India shall, before the expiry of a period of ninety days from such commencement or such further period as the Reserve Bank may allow in this behalf, make a declaration in such form as may be specified by the Reserve Bank regarding the immovable property or properties held by such person or company.”

The appellant/defendant no. 3 urged that he was the executor to the will of the original defendant who was a foreign citizen and that the Reserve Bank of India had not given any general or special permission for acquisition or transfer of the subject immovable property. Therefore, the agreement for sale on which the suit for specific performance was based was illegal and void. The suit was barred by law and ought to be dismissed.

By the impugned judgment and order dated 4th May 2021 the learned judge made a detailed analysis of the facts and the law. But her ladyship was confined to consideration of the application on the principles of Order 7 Rule 11 of the Code which inter alia enunciated that the suit must from a statement in the plaint appear to be barred by law. The learned judge confined herself to the said provision and rejected the application on inter alia the finding that from the statement in the plaint the suit did not appear to be barred by law.

We reproduce the material part of that finding.

“A Court which is called upon to decide the issue cannot engage with the alleged statutory violation or the fact to be determined beyond the limits of what the plaint discloses.”

The suit is more than 30 years old. It is awaiting trial. The above issue is of paramount importance. It goes to the root of the matter. If the defendant no.3/appellant is able to show that for lack of permission by the Reserve Bank of India to sell the immovable property even an agreement for sale could not have been entered into that is the end of the matter. The agreement would be adjudged as illegal and void. No suit could be based on that agreement. Hence the suit could be adjudged to be barred by law.

This point going to the root of the matter has to be adjudged first before other issues are gone into by the Court. From the records it is not clear as to what stage the suit has progressed.

But it is clear that before the suit is to progress any further then this point has to be determined as a preliminary issue.

Now to determine this preliminary issue, issues of fact may also have to be determined by the Court. According to us, it should be left to the learned trial judge to come to a decision whether this issue could be determined as a pure question of law or a mixed question of fact and law. In order to shorten the litigation and to ensure the convenience of the parties we also leave it to the learned trial judge to order discovery of documents limited to this issue only or select the documents already disclosed on discovery pertaining to this issue only and determine the preliminary issue by trial on evidence.

After the preliminary issue is determined, the other issues may be determined, if so required. We make it absolutely clear that inquiry of the learned single judge was confined to the Order 7 Rule 11 principles but the inquiry to be made by the learned trial judge pursuant to this order would be limitless so as to determine the preliminary issue.

Although under Order 7 Rule 11 there is some justification for the impugned order, nevertheless we are of the view that at the trial of the suit it should not stare at the face of the rules.

In those circumstances, the impugned judgment and order dated 4th May 2021 is set aside with a request to the learned first court to dispose of the suit as early as possible, subject to the convenience of the bench.

The appeal and the connected application are disposed of.

(I. P. MUKERJI, J.)

(ANIRUDDHA ROY, J.)

R. Bose